

No. 10,381

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES W. BUTLER, et al.,

Appellants,

VS.

GRACE APPLETON McKEY,

Appellee.

**APPELLEE'S PETITION FOR A REHEARING
AND BRIEF IN SUPPORT THEREOF.**

SULLIVAN, ROCHE, JOHNSON
& FARRAHER,
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FILED

OCT 8 - 1943

**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

JAMES W. BUTLER, MARY L. BUTLER, MARY SEGUIN,
CLARA VERSCHOOR, LILLIAN FITZGERALD, DAVID J.
LEWIS, ELIZABETH A. LEWIS, JOHN LINGIE SMITH,
ELLA RUTH SMITH, PATRICK J. LEONARD, ANNIE
LEONARD, STEPHENS C. PERRY, CARLE HILLE-
BRAND, MRS. C. C. E. HILLEBRAND, FRED HUSSEY,
MRS. H. L. GOOCH, OSCAR SWANSON, MARVIN WAL-
TER WAFER, GEORGE W. IRVINE, BETTY DU BOIS,
MRS. I. B. BRAWLEY, MARGARET JOHNSTONE, JAMES
J. PHELAN, J. H. PEGRAM, MRS. J. H. PEGRAM,
MARIE C. KNIEF, AMOS WASHINGTON, DOROTHY
LEWITZ, MARIE C. CROSS, VIOLETTE M. CROSS,
CHARLES L. FORSBERG and MADGE McNAUL,

Appellants,

vs.

GRACE APPLETON McKEY,

Appellee.

No. 10,381

Sep. 8, 1943

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

Before: DENMAN, MATHEWS and STEPHENS, Circuit
Judges.

STEPHENS, Circuit Judge.

Plaintiffs appeal from an order of the district court, granting a motion to quash service of summons on defendant, appellee herein, and vacating the default judgment entered against her, which order was made after the expiration of the period set aside for questioning a judgment directly.

Plaintiffs filed a creditors' bill in the District Court of the United States for the Northern District of California on Novem-

ber 19, 1936. The suit was based upon the statutory stockholders' liability of defendants as shareholders of the Woodlawn Trust and Savings Bank, an Illinois corporation. All of defendants, but none of plaintiffs, were citizens and residents of California. Some of defendants, including appellee herein, resided in the Southern District of California. Appellants in January of 1939 made a motion requesting an order for the publication of summons upon appellee on the grounds that appellee could not after due diligence be found within the state or within the jurisdiction of the court and that appellee was concealing herself to avoid service of summons. The motion was supported by an affidavit signed by Fred S. Herrington, one of plaintiffs' attorneys. The affidavit outlined in detail the efforts made by the United States Marshal at Los Angeles to effect service which acts were recounted in letters to affiant, noted that the original subpoena was filed with the clerk, and made reference to the same for further particulars and to the marshal's return affixed thereto. The return consists of a certification by each of three deputy marshals that on a certain day, different in each case, he received the subpoena ad respondendum and that after diligent search he was unable to find appellee. The affidavit then related what had been reported to affiant as to the numerous attempts to effect service of Leo K. Gold, an attorney appointed by the court to serve upon appellee the subpoena ad respondendum as well as any alias or other subpoena. It referred to unsuccessful inquiries made by a Los Angeles law firm to serve appellee in another proceeding. There followed a paragraph containing in effect the following statements: that, in view of the foregoing, plaintiffs' attorneys realized the futility of further endeavor; that Grace McKey could not after due diligence be found within the state; that affiant was informed and believed and therefore alleged as a fact that Grace McKey was concealing herself to avoid service; that affiant and plaintiffs' attorneys had made a diligent search for appellee and had inquired of everyone from whom they could expect to receive information as to appellee's whereabouts; and that they did not know and could not learn her whereabouts except that they were informed and believed and therefore alleged as a fact that appellee was residing in California.

The court ordered publication of summons. The order declared: "it further appearing to the satisfaction of the Judge from said affidavit and from other evidence, and the Court finds * * * that diligent search has been made for said defendant Grace Appleton McKey in the State of California and within the jurisdiction of this Court in order to serve said subpoena and said alias subpoena upon her, and that said defendant cannot, after due diligence, be found within the State of California or the jurisdiction of this Court, and that said defendant has been and now is concealing herself to avoid the service of said process * * *." The proper steps having been taken to accomplish service by publication, a judgment by default of the clerk was entered on April 18, 1939. Included therein was a recital that the defendant Grace Appleton McKey had "been duly and regularly served with summons."

In 1942, more than three years after entry of judgment, appellee moved the court to quash service of summons setting up as one ground that the court had no jurisdiction to order the publication of summons as the affidavit upon which the order was based contained facts predicated upon hearsay. The court granted the motion and vacated the default judgment. At the same time it denied appellee's motion to dismiss and appellants' motion to file additional affidavits concerning the attempted service. Appellants appeal from the order of the district court except insofar as it denies the motion to dismiss the action.

Although the original action was commenced in 1936, the motion requesting an order for the publication of summons was not made until 1939 and therefore, under the provisions of Rule 86, is governed by the Federal Rules of Civil Procedure. Rule 4 (d) (7) decrees that service upon an individual such as appellee can be accomplished according to any statute of the United States or according to the law, relative to actions in courts of general jurisdiction, of the state in which service is made.

For the reason that the method used herein followed the terms of § 412 of the California Code of Civil Procedure, we treat first of the California law. The cited section provides: "Where the person on whom service is to be made * * * cannot, after due

diligence, be found within the State; or conceals himself to avoid the service of summons; * * * and the fact appears by affidavit to the satisfaction of the court * * *; and it also appears by such affidavit or by the verified complaint on file, that a cause of action exists against the defendant * * *, such court * * * may make an order that the service be made by the publication of the summons * * *.'''

The California decisions are not entirely clear as to the effect of hearsay statements in an affidavit in support of an order for publication of summons. A statute defining service in such manner must be strictly construed, *Galpin v. Page*, 85 US 350; *Braly v. Seaman*, 30 Cal. 610, and the facts showing exactly what means were taken in the exercise of due diligence must be set forth in the affidavit, *Ricketson v. Richardson*, 26 Cal. 149. The instant motion must be considered under the principles applicable to a collateral attack, for, although it is a direct attack, the motion was presented after the time for a direct appeal had expired, *City of Salinas v. Luke Kow Lee*, 217 Cal. 252. It is a basic rule that a judgment is void and subject to collateral attack if a lack of jurisdiction in the court appears on the face of the record. Therefore, the question involved herein is whether the default judgment was void on its face as showing that the court therein acquired no jurisdiction over the person of appellee by means of the published summons.

It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that such a hearsay affidavit does not automatically render the judgment void, *Rue v. Quinn*, 137 Cal. 651; *Ligare v. California Southern Rr. Co.*, 76 Cal. 610. Directly contra to this principle is *Kahn v. Matthai*, 115 Cal. 689, and perhaps *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445. The *Kahn* case determined that an affidavit containing hearsay as to the exercise of due diligence was insufficient to uphold an order for publication. It involved a direct appeal from the judgment questioned. It mentioned the fact that an affiant cannot be held responsible for the truthfulness of hear-

say statements in an affidavit. The California District Court of Appeal in *Application of Behymer*, 130 Cal.App. 200, followed the reasoning of the Kahn case explicitly and on a collateral attack held a prior judgment void. However, in the meantime in *Rue v. Quinn*, supra, the Supreme Court had restricted the effect of the Kahn case to circumstances where a direct appeal was taken from the judgment questioned.

The California cases support the conclusion that on a direct appeal from a judgment an affidavit based upon hearsay will be found fatally defective, and the judgment will be ordered reversed. However, on a collateral attack or on a direct attack after the expiration of the period for appeal the affidavit will be found sufficient, and the judgment will not be held void. The comparison was clearly drawn in the early case of *Forbes v. Hyde*, 31 Cal. 342, 348: "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. His order would, in such case, be reversed on appeal. * * * Such a judgment could not be collaterally attacked."

As heretofore stated, the affidavit in the instant case contains more than statements based upon hearsay. It alleges that affiant and plaintiffs' attorneys "have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect, or had any reason to believe they would receive, information as to the whereabouts of said defendant," and is in other respects similar to the affidavit held sufficient on collateral attack in *Ligare v. California Southern Rr. Co.*, 76 Cal. 610. Furthermore, it refers to the return of the United States Marshal and therefore incorporates positive statements from at least three individuals as to their inability

to find appellee. Therefore, the affidavit would adequately support the order of publication of summons upon appellee, and the default judgment against her would be valid in California.

The result under the federal decisions would be the same. *Thompson v. Thompson*, 226 US 551, 556, involved a situation closely analogous. There the Supreme Court, after concluding that an affidavit made wholly on information and belief was a sufficient basis for an order for publication of summons under Virginia law, set forth as an additional ground for its decision that even though the Virginia law were otherwise, the judgment might be erroneous but would not be void on its face where the affidavit was defective "not in omitting to state a material fact, but in the mode of stating it or in the degree of proof." The Supreme Court remarked in *Pennoyer v. Neff*, 95 US 714, that defects in an affidavit supporting an order for publication of summons cannot be utilized to impeach a judgment collaterally but only to question it on appeal. The court looked to the return of the marshal as well as the affidavit, under a statute similar to the California statute, in *Marx v. Ebner*, 180 US 314, and mentioned the presumption that a public officer has done his duty and has conducted the diligent search required. Should a like practice be followed in the instant case, the marshal's return in the record would constitute a direct statement of due diligence.

The argument is not tenable that a perjury charge cannot be sustained against an affiant who sets forth hearsay matter as fact. In a situation where no specific information has been imparted to him, if a man swears that he has received such information, and if he swears that because of such information, a defendant could not with due diligence be found or a defendant was concealing himself to avoid service, he subjects himself to liability for perjury, for he has corruptly made a positive statement. *Cohen v. Portland Lodge No. 142, B.P.O.E. (CCA 9)*, 152 Fed. 357.

Reversed.

(Endorsed:) Opinion. Filed Sep. 8, 1943. Paul P. O'Brien, Clerk.

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APPELLEE'S PETITION FOR A REHEARING AND BRIEF IN SUPPORT THEREOF.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Comes now Grace Appleton McKey, the appellee in the above entitled cause, and presents this, her petition for a rehearing of said cause upon the grounds hereinafter set forth.

INTRODUCTION.

Because practically no defendant (unless he is a confirmed reader of legal periodicals) ever sees the published summons aimed at him or her, and judg-

ments thereon are made without the suspicion of the judgment debtor that he or she has even been served, our State Legislature has required strict proof by *affidavit*, as an essential jurisdictional basis for the order directing publication of summons.

In the present case the causes of actions included in the complaint were all outlawed. The indebtedness, according to the complaint, was incurred June 22, 1932 (R. 21), and the action was filed November 19, 1936. (R. 31.) The statute of limitations is of course that of the forum. The action was on a statutory stockholder's liability and the causes of action therefore became outlawed (under Sec. 338 of the California Code of Civil Procedure) in three years, or one year and five months before it was filed. Appellants, doubtless, filed the action with a hope and prayer that anyone served would not consult a lawyer or that on published service there would be no appearance.

Here appellants took judgment against appellee for \$110,000.00, without her knowledge that she had ever been served (R. 76), when, had she known of the service, by merely appearing she could have walked out of Court with her costs and no judgment against her.

GROUND'S FOR A REHEARING.

We know that if this Court can be convinced that in reversing the trial Court's order setting aside the

default against appellee, it has incorrectly determined the law point involved, it will without hesitation grant a rehearing of the cause.

We believe that the opinion of this Court is plainly in error in the following particulars:

(1) After determining that the law of this State as to publication of summons governs, it adopts as the law applicable with reference to the hearsay affidavit, upon which the order for publication of summons was predicated, two decisions of the Supreme Court of California reported respectively in Vols. 76 and 137, California Reports, and concedes that the same Supreme Court in a *later* decision reported in 138 Cal. Rep. is “perhaps directly contra”.

(2) It adopts language from the affidavit of Fred S. Herrington, upon which the order for publication of summons was based, as describing the activity of the affiant, whereas that language when interpreted in the light of the affidavit as a whole becomes a mere conclusion drawn from the facts related earlier in the affidavit by way of hearsay; and in so doing it ignores the fact that appellant in its opening brief declares otherwise and the trial Court found otherwise.

(3) It ignores that portion of the affidavit in which the affiant recites on information and belief that no certificate of residence had been filed by appellee with the Recorder of the City and County of San Francisco (to which we particularly directed attention in the oral argument), a fact which *must*

be alleged before jurisdiction can attach and which under the unconflicting authority must be made directly and upon positive oath.

I.

THE COURT IN ITS OPINION HAS ADOPTED AS THE LAW OF CALIFORNIA A DECISION OF THE SUPREME COURT THEREOF WHILE ADMITTING THAT A LATER DECISION OF THE SAME COURT HOLDS TO THE CONTRARY.

The Opinion.

On page 4 of its opinion this Court said:

“It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that *such a hearsay affidavit does not automatically render the judgment void, Rue v. Quinn*, 137 Cal. 651; *Ligare v. California Southern R.R. Co.*, 76 Cal. 610. **DIRECTLY CONTRA** to this principle is *Kahn v. Matthai*, 115 Cal. 689, and *perhaps Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445.” (Emphasis ours.)

If, as the Court said above, the decision of *Columbia Screw Co. v. Warner Lock Co.* (supra), is contra to *Rue v. Quinn* (supra), decided six months earlier, then this Court is in error in adopting the *Rue v. Quinn* decision as the law of this State.

**Columbia Screw Co. Case Is the Law of California
and Is Contra to This Court's Decision.**

That the *Columbia Screw Co.* case holds that the affidavit required by Section 412, C. C. P., must be on positive oath, and that an affidavit which is based on hearsay does not give the trial Court jurisdiction to make an order for publication of summons, cannot be questioned.

When the Supreme Court there said:

“When the statute uses the words ‘appears by affidavit’ it means more than an affidavit as to what someone told the party making the affidavit”,

it meant that the facts necessary to give the Court jurisdiction cannot be supplied by an information and belief affidavit.

And when it said:

“In a proceeding against the defendant, without personal notice, it has the right to insist that the statute was not observed in substance”,

and that

“The order, being void, the attempted service by publication is void”,

it was rejecting as a nullity an affidavit based upon information supplied by someone other than the affiant. Finally the Court in that case said that since the trial Court never acquired jurisdiction of the defendant

“*the judgment should not be enforced in any manner.*” (p. 448; emphasis ours.)

These statements of our Supreme Court do not support this Court's statement that:

"it seems evident that in California an affidavit based on information and belief would support an order for publication of the published summons." (p. 4.)

The Cases Relied Upon by This Court in Its Opinion.

We believe that this Court in the present case has been misled by some rather indefinite language in *Rue v. Quinn*, upon which it relies. This Court cites *Rue v. Quinn* (supra) and *Ligare v. California Southern Ry. Co.* (supra), as holding that:

"the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that a hearsay affidavit does not automatically render the judgment void." (p. 4.)

We believe we can demonstrate by appropriate quotation from those opinions that they do not so hold.

Ligare v. Calif. So. Ry. Co. Does Not Support the Opinion in This Case.

In *Ligare v. California Southern Ry. Co.* the attack upon the affidavit did not include any reference to the fact that it was based upon hearsay, but was limited to the claim that there was not a showing of sufficient diligence. Furthermore, the affidavit in question recited a search made by the affiant, including an inquiry of

"all persons from whom he could expect to obtain information as to the residence of the defendants." (p. 612.)

The Court finally held that while the showing was not full enough to stand on appeal, it was sufficient to give jurisdiction. (See bottom of p. 613.)

**Rue v. Quinn—Citation Relied Upon
By This Court.**

In *Rue v. Quinn*, 137 Cal. 651, the affidavit, in addition to reciting delivery of summons to the Sheriff and stating what the Sheriff reported back, declares that:

“the *affiant* (to quote from the court’s description of the affidavit) had made due and diligent search and inquiry for the said defendants and each of them for the purpose of serving a summons upon them, by inquiring for each of them of several prominent officers (giving the names of such officers); and further stated, ‘I have also made inquiry of all other persons from whom I could expect to obtain information as to the residence or whereabouts of each of the said defendants, and after such search and inquiry the said defendant cannot be found within the state.’ ”

It must be observed that, besides stating what the Sheriff reported that he had done (which would of course be hearsay) the affiant described what he personally did in the way of a search (which of course was not attackable as hearsay). That is undoubtedly why the Court in that case said that “all of the facts verified were within the knowledge of affiant.” The facts the Court was referring to were the ultimate facts that the plaintiff could not be found after a diligent search. They were in the knowledge of the affiant because he himself made the search.

The Court's reference to hearsay (p. 657) was not as to what the Sheriff said, but as to the information the affiant received from the San Diego residents of whom he made his inquiries. This is clearly evident from the fact that the objection was connected with the contention that the affiant did not inquire of a sufficient number of persons and from the fact that the Court said that

"the evidence thereon must to a very great extent be hearsay."

The Court in that case certainly was not directing its attention to what the Sheriff reported, because that did not have to be hearsay, for it would have been a simple matter for the plaintiff to have secured an *affidavit* from the Sheriff. On the other hand, the information the affiant received from neighbors, etc., in answer to his inquiries could not, except with great difficulty, be incorporated into direct affidavits. And since the pertinent fact is whether the *affiant* made the search, the comments from neighbors do not detract from the fact that the affiant made a personal search.

This Court, in the present case, at the bottom of page 4 of the opinion, said:

" * * The Kahn case determined that an affidavit containing hearsay as to the exercise of due diligence was insufficient to uphold an order for publication. It involved a direct appeal from the judgment questioned. It mentioned the fact that an affiant cannot be held responsible for the truthfulness of hearsay statements in an affidavit. The California District Court of Appeal in Ap-*

plication of Behymer, 130 Cal. App. 200, followed the reasoning of the Kahn case explicitly and on a collateral attack held a prior judgment void. However, in the meantime in *Rue v. Quinn*, supra, the Supreme Court had restricted the effect of the Kahn case to circumstances where a direct appeal was taken from the judgment questioned."

The Kahn case did not hold that an "affidavit containing hearsay" as to the exercise of due diligence was insufficient to uphold an order for publication. It held that a *hearsay affidavit* is of no force—which the same Court has frequently held since that decision was rendered, and *it disregarded the hearsay part of the affidavit*. But in the affidavit in that case there were direct allegations of what the affiant did personally. He recited that he spoke to the

"two daughters of the defendant, requesting them to allow the said defendant to be served with the said copy of summons and complaint; and that said daughters, and each of them, both being of legal age, refused to allow the defendant herein to be served with said papers, and are using every endeavor in their power to prevent said service." (693.)

After declaring that a hearsay affidavit was valueless, the Court directed itself to the latter part of the affidavit and held that the affidavit was not in sufficient detail—a point which could be raised on appeal, but not on a collateral attack.

Nowhere in *Rue v. Quinn* does the Court say that an affidavit, which as to all material facts relies upon

hearsay, is evidence and gives jurisdiction for an order for publication of summons. Its reference to *Kahn v. Matthai*, 137 Cal. 654 (mentioned in the above quotation from this Court's opinion), is not to the Court's reference in that case to hearsay, but to the fact that in the *Matthai* case the Court had a right to determine whether the affidavit showed in sufficient detail the requisite amount of diligence, which was the point to be determined in *Rue v. Quinn*.

Rue v. Quinn very properly held, we believe, that "there is no difference in principle when it affirmatively appears from the judgment record itself that the court had no jurisdiction of the defendant, whether the attack upon the judgment is direct or collateral. If the judgment is void it is not available in either case." (p. 654.)

And when it held that

"If either of these facts (the exercise of due diligence to find the defendant within the state, and a failure to find him after the exercise of due diligence) *does not appear by affidavit*, the court or judge has no jurisdiction to make the order, and an order made thereon will be insufficient to sustain a judgment based upon such service." (p. 655.)

The decision in *Application of Behymer*, 130 Cal. App. 200, in declaring the order void, did, as this Court commented, follow the decision in *Kahn v. Matthai*, but only that part of the decision which held a hearsay affidavit to be of no effect. Whereas, when the Supreme Court in *Rue v. Quinn*, referred to the holding of *Kahn v. Matthai* as having been a

direct attack in the form of an appeal, it was not addressing itself to the holding of the *Kahn* case decision, that hearsay is not legal evidence, but to the holding in that case that the showing as to diligence was insufficient. In the *Kahn* case there was in the affidavit some evidence of diligence which was free from the hearsay taint. The Court, in *Rue v. Quinn*, did not even insinuate that an order based upon an affidavit which as to every material point was hearsay was not void and could not be attacked collaterally.

Incidentally, the affidavit in the *Behymer* case is almost identical with the affidavit in the case at bar, except that it first alleges the fact of diligent and unsuccessful search and then recites what the search consisted of, whereas Mr. Herrington's affidavit here recites first what was done and then closes with the allegation that there was a diligent and unsuccessful search. In the affidavit in each case the facts referred to are contained in hearsay reports to the affiants of the activity of a Los Angeles process server employed to make the search.

**This Court's Citation—*Forbes v. Hyde*
Is Contra to Its Opinion.**

On page 5 of the opinion this Court states as the rule that

“the California cases support the conclusion that on a direct attack from a judgment, an affidavit based upon hearsay will be found fatally defective and the judgment will be ordered re-

versed. However, on collateral attack or on direct attack after the expiration of the period for appeal the affidavit will be found sufficient and the judgment will not be held void,"

and then cites *Forbes v. Hyde*, 31 Cal. 342, 348, as clearly drawing the comparison, and quotes at some length from the decision in that case.

Forbes v. Hyde, in our opinion, does not support the Court's conclusion. There, *in a collateral attack by strangers to the judgment*, the Court held that where the affidavit of plaintiff for publication stated that

"he has a good cause of action in this suit against defendant and that he is a necessary and proper defendant thereto, as he verily believes"

there was no *legal* evidence for the Court to act upon and that therefore the order for publication and the default judgment taken thereunder were absolutely **VOID**.

So in considering the language quoted from *Forbes v. Hyde* in this Court's opinion one should have in mind that an affidavit based upon the affiant's *belief* was considered by the Court in that case as containing no "*legal evidence*"; and that when the Court referred to "*evidence*" it meant *legal* evidence. This fact is brought home too clearly to permit of any doubt in the following excerpt from the *Forbes v. Hyde* decision which appears later in that decision, that

“* * * *The fact must appear by affidavit before jurisdiction to make the order attaches.* That is to say, there must be an affidavit containing a statement of some fact which would be *legal evidence*, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act upon before he has an jurisdiction to make the order. Unless the affidavit contains some such evidence tending to establish every material jurisdictional fact, the Judge has no legal authority to be satisfied, and, if he makes the order, he acts without jurisdiction, and all proceedings based upon it are void.”

**Herrington's Affidavit in Light of
Forbes v. Hyde.**

The code provision requires an affidavit of certain facts. The presence of those facts in *affidavit form* is necessary to the Court's jurisdiction. A hearsay affidavit is not legal evidence. If the affidavit fails to contain legal evidence the Court acquired no jurisdiction and the order and judgment are void under direct or collateral attack.

The facts which must appear by affidavit to give the Court jurisdiction under Section 412, C. C. P., are

(1) The defendant cannot after due diligence be found within the state, or conceals himself to avoid service;

(2) A cause of action exists against the defendant;

(3) There has not been filed, on behalf of the defendant, a certificate of residence either in the

county in which such action was brought * * * is pending.

(1) Herrington in San Francisco makes an affidavit that someone gave him a Los Angeles address of appellee. How did he know that defendant was not still residing at that address and there amenable to service? Whatever information he had in that regard came from the Marshal or Mr. Gold. The code section does not say proof may be by unverified return of the Sheriff—*it must be by affidavit*. Is the fact that Herrington employed the Sheriff to make service, and then secured the appointment of Gold to make the service, evidence that the defendant could not be found in Los Angeles after a diligent search? Appellants did not think it was sufficient, because after appellee made her motion they sought to correct the situation by seeking leave to file affidavits of the Marshal and Mr. Gold.

(2) *Forbes v. Hyde* (supra) is direct authority for the proposition that alleging the affiant's *belief* that a cause of action existed against the defendant, rendered the order for publication, and the judgment which followed, void under collateral attack.

(3) When affiant Herrington alleged on information and belief that defendant had not filed a certificate of residence in California he was not swearing to the fact, but merely to his belief. Such an affidavit is but hearsay and does not constitute "legal evidence" upon which the Court could take jurisdiction and act.

**Cohen v. Portland Lodge Is Not
California Law.**

In closing its opinion, this Court rejects our argument that a perjury charge cannot be predicated upon a hearsay affidavit, declaring it untenable and citing the Court's opinion in *Cohen v. Portland Lodge of B. P. O. E.*, 152 Fed. 357 (which is a case involving Oregon law and is therefore of little aid in determining the interpretation of a California statute by California Courts) in support of its proposition that:

“in a situation *where no specific information has been imparted to him*, if a man swears that because of such information, a defendant could not with due diligence be found or a defendant was concealing himself to avoid service, he subjects himself to liability for perjury, for he has corruptly made a positive statement.” (p. 6; emphasis ours.)

Naturally if a man swears to having received certain information when he had not received any such information, he has committed perjury, assuming the evidence is material. But if a person recites that he received information from others, which he in fact receives, he of course does not commit perjury, *and yet the information he received might be entirely false.*

If I say that I went to defendant's address in Los Angeles in search of defendant, and could not find him there, I am reciting what I did and if I did not make such a trip, I am stating what is false. But if I hire someone else to go to defendant's address, and the one I hired tells me that *he* went to defendant's

address in search of him and could not find him, and I recite in an affidavit just what my hired man told me and credit him with the statement, I cannot be guilty of false swearing, even though every word my hired man told me were false.

In the present case, every statement which had to do with any effort to serve or locate the defendant appellee, was, according to the information supplied Herrington, made by either the Marshal or Mr. Gold. Consequently Herrington, the signer of the only affidavit before the Court issuing the order for publication of summons, knew none of the facts of his own knowledge—it was as to him mere hearsay. If he had been on the witness stand any testimony offered by him as to any efforts to serve appellee, would have been rejected under the hearsay rule. Where the testimony is offered by way of affidavit, in the absence of the defendant, for the purpose of securing an order for the publication of summons which publication would be seen by the defendant only by the merest accident, it would seem that the hearsay rule should be more rigidly enforced rather than relaxed.

II.

THE OPINION ADOPTS HERRINGTON'S CONCLUSION AS A STATEMENT OF FACT.

The Court in its opinion says that part of the affidavit in this case is free from the hearsay objection. The language used is as follows:

“It alleges that affiant and plaintiff’s attorneys ‘have made a diligent search for said defendant and made inquiries of each and every person whom they could suspect, or had any reason to believe they would receive, information as to the whereabouts of said defendant’ and is in other respects similar to the affidavit held sufficient on collateral attack in *Ligare v. Calif. So. Ry. Co.*, 76 Cal. 610. Furthermore, it refers to the return of the U. S. Marshal and *therefore incorporates positive statements from at least 3 individuals as to their inability to find appellee.*”

It is apparent that this Court was accepting the above quoted language as a recital of a search made by the affiant rather than a conclusion drawn from the search made by process server Gold and the Deputy Marshal.

Affidavit Taken as a Whole Shows Statement Is Conclusion Based Upon Hearsay.

We respectfully submit that the arrangement of the context of the affidavit clearly indicates that reference was being made to the information obtained by the affiant from the letters of Gold and the Deputy Marshal. After using up ten pages of the record in reciting what Gold and the Deputy Marshal had reported to the affiant by letter, the affidavit continues:

“That in view of the foregoing, affiant and plaintiff’s lawyers have decided it would be futile to spend further time, effort and money in an attempt to effect personal service of process on said defendant; that said defendant Grace Appleton McKey cannot, after due diligence, be found

within the State of California, and cannot be personally served with subpoena or other process.” (Emphasis ours.)

Then in the same paragraph affiant makes the statement which is quoted in the opinion. It seems clear to us that the “inquiries” that affiant is referring to are not inquiries made directly by them, but inquiries made through the attorney’s agents, which were reported to the attorneys by letter as related in the earlier part of the affidavit.

Appellants’ Opening Brief Shows Appellants Made No Claim of a Search by the Affiant.

We are not alone in this belief. The trial judge and appellants’ attorneys agree with us. The trial judge, by vacating the decree because the affidavit was hearsay, necessarily must have reached that conclusion. That appellants’ attorneys make no claim that they or Herrington made any independent search to determine respondent’s whereabouts, is clearly evidenced by the following language appearing on page 5 of Appellants’ Opening Brief, under the heading, “Statement of the Case”, viz.:

“Subpoena could not be served upon appellant because the United States Marshal, after diligent search, was unable to find her. After the United States Marshal had returned the subpoena unserved, alias subpoena was issued and upon appellant’s motion Leo K. Gold was appointed to effect service of the alias subpoena upon appellee and other defendants.” (Then is

inserted an excerpt from the order appointing Gold.) “Leo K. Gold was unable to serve process upon appellee. *Thereupon appellant moved for publication of subpoena* upon the grounds that appellee, after due diligence could not be found within the state, etc.”

In other words, upon unsuccessful “searches” by the Marshal and Gold, motion was made for the order of publication,—not even a suggestion that the order was predicated upon any search except those of Gold and the Marshal.

Herrington Could Not Swear of His Own Knowledge as to Essential Facts.

Obviously the purpose of the recital of the contents of Gold’s letter and the Marshal’s report was to establish the fact of due diligence in the search, and the lack of success therein. It is equally obvious, we believe, that if Herrington, from the witness stand, attempted to testify as to what Gold and the Marshal wrote him, the Court would have had to reject such testimony under the hearsay rule. Herrington started with an address for appellee, to-wit, 1550 North Fairfax Ave., Hollywood, California. (Herrington affidavit, R. 47.) Therefore, the search naturally would start from there. Is there any statement in the affidavit that Herrington went to Los Angeles to make the search? Is there anything in the affidavit to show that Herrington had any information that appellee was not at that address, which did not come to him in hearsay form from Gold or the Deputy Marshal?

When the Court says in its opinion, with reference to the affidavit of Herrington, that

“Furthermore, it refers to the return of the United States Marshal and therefore incorporates positive statements from at least three individuals as to their inability to find appellee”,

it was ignoring the words “appears by affidavit”. There are places where the unsworn to return of a Marshal is sufficient to establish the fact therein recited, but where the Code expressly requires an “*affidavit*”, a return of course cannot fill the bill. The only “evidence” before the trial Court when the order was made, as to Gold’s activities, were in quotations from his letters to Herrington, contained in the latter’s affidavit. So his contribution is not under oath.

Employing someone else to make a search does not of itself constitute a diligent search. If defendant McKey was at the 1550 North Fairfax address and a real attempt to serve her would have been successful, there could have been no foundation for publication of summons. Herrington’s affidavit does not reveal that he personally made an effort to serve her and was unable to do so. He merely says that he gave the papers to the Marshal and Gold and they told him they couldn’t serve or find her. So the essential fact, upon which jurisdiction of the trial Court for making the order for publication of summons had to rest, appeared only upon the information and belief of Herrington.

A Witness Can Only Testify as to His Personal Knowledge.

Section 412, *C. C. P.*, says that the fact that the defendant

“cannot after due diligence be found within the State, or conceals himself to avoid service”

must appear by *affidavit*. No other character of proof is provided for.

The Supreme Court in *Rue v. Quinn*, 137 Cal. 651, at 655, relied upon in this Court’s opinion in the present case, declared that if the facts showing due diligence, etc.,

“do not appear by *affidavit*, the Court or Judge has no jurisdiction to make the order, and an order made thereon will be insufficient to sustain a judgment based upon such service.”

Section 1845, *C. C. P.*, reads:

“A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those express cases in which his opinions or inferences or the declaration of others, are admissible.”

The California Supreme Court, in *Gay v. Torrance*, 145 Cal. 144, 151, held that an affidavit filed in a motion for new trial based on claimed “irregularities” was of no avail because every *material* statement therein was made upon information received from others; was not competent evidence and was “unavailing for any purpose”. The Court, in passing upon the matter, said (at p. 152):

“* * * where one is testifying as to something that has transpired he can ordinarily testify only as to those facts which he knows of his own knowledge (Code Civ. Proc., sec. 1845), and it is immaterial in this connection whether his testimony is taken by affidavit, deposition, or oral examination.

“Where a statute provides that the evidence upon a certain question must be presented by affidavit it simply means that the competent and material testimony must be presented by the *affidavits of the witnesses*. If the statute authorized the taking of the testimony on a motion for new trial by oral examination, we apprehend that it would not be contended *that Mr. Newby could have given purely hearsay testimony*. * * *” (Emphasis ours.)

III.

THE JUDGMENT IS VOID BECAUSE PLAINTIFFS (APPELLANTS) FAILED TO ESTABLISH BY AFFIDAVIT, THAT NO CERTIFICATE OF RESIDENCE WAS FILED BY DEFENDANT (APPELLEE) IN SAN FRANCISCO.

The Code Sections.

Section 412 of the California Code of Civil Procedure provides that:

“Where service is sought to be made upon a person by publication upon the ground that he cannot after due diligence be found within the state, *it must first appear by the affidavit aforesaid* that there has not been filed, on behalf of such person, either in the county in which such action was brought, or in the county in which such

action is pending, the certificate of residence provided for by Section 1163 of the Civil Code.” (Emphasis, of course, ours.)

Section 1163 of the Civil Code provides for recording in the office of the County Recorder of a certificate by a person or corporation designating the place where service might be made on such person or corporation.

Herrington's Affidavit Is Insufficient to Give Jurisdiction.

The only reference in the affidavit to the absence of the certificate referred to in Section 412, quoted above, is the following:

“That affiant is *informed and believes and therefore alleges the fact to be that* there has not been filed by said defendant or on her behalf, in the City and County of San Francisco, State of California, where said action was brought and is pending, a certificate of residence as provided by Section 1163 of the Civil Code of California.”

At the oral argument we called to the Court's attention the fact that the above quoted portion of Herrington's affidavit failed to meet the requirement of the Code section.

The mandatory “must” of the Code section means just that. It was so held in *McPhail v. Nunes*, 38 Cal. App. 557, 560, in which case the affidavit for publication made no reference to the absence of the certificate discussed in Section 1163 (*supra*).

Court: “It cannot for a moment be doubted that, to have legally authorized the court to make

the order for the publication of the summons, it was *absolutely necessary* that the affidavit should have contained the statement either that no certificate designating the place where the summons might be served on the defendant, Copper, in said action, had been filed, or that, if filed, the defendant could not be found by the sheriff at the place designated in the certificate where summons might be served. The failure to do so rendered the affidavit fatally defective. In other words, by reason of the failure to incorporate that statement in the affidavit, section 412 of the Code of Civil Procedure was not only not substantially complied with, but legally the same as not complied with at all." (Emphasis ours.)

The Court in the *McPhail* case goes on to state that the trial Court has no power to make the order for publication, unless the affidavit recites the absence of the certificate of residence provided for by Section 1163 of the Civil Code; and then disposes of the contention that the point could not be raised collaterally, by saying:

"The affidavit for publication of summons and the order directing publication of the same are part of the judgment-roll, where the service of summons is constructive or by publication. It is, of course, well settled that where the judgment is void upon its face it may be attacked collaterally. In other words, if an inspection of the judgment-roll itself discloses that the judgment is for any reason void, the judgment may be so declared and as having no force or effect *on a collateral as well as on a direct attack thereon.*" (562) (Emphasis ours.)

We said in the oral argument that it was elementary that the contents of a public record or the absence thereof could not be pleaded on information and belief, because the fact is available to the pleader. The books are spotted with cases so holding. In *Home Owner's Loan Corporation v. Gordon*, 36 Cal. App. (2d) 189, the defendant, in answering the complaint, alleged *upon information and belief* that the plaintiff had not complied with the section of the Civil Code which provides that a foreign corporation, before it can sue in California Courts, must register in California. The Appellate Court held that such an allegation was of no effect, saying:

“This violates the rule of pleading, which requires that matters of record must be alleged positively and not upon information and belief. This rule is particularly applicable to a pleading in abatement which, being dilatory in its nature, is to be strictly construed.” (192)

(It will be recalled from the authorities cited in the briefs, that Section 412, *C. C. P.*, is to be strictly construed because of the possibility that judgment might be had without defendant's knowledge.) And the Supreme Court of California in *Art Metal Constr. Co. v. Anderson*, 182 Cal. 29, stated the same rule in the following language:

“It is well settled in this state that when the existence of an alleged fact may be ascertained from an inspection of a public record, its existence cannot be put in issue by a denial based solely upon information and belief.” (Citing cases.) (33)

To the same effect, see *Lincoln County Bk. v. Geo. C. Fetterman*, 170 Cal. 357.

Appellant may say we have not claimed that any certificate was filed. The answer to this is that we are not obligated to meet a *void* judgment. On the contrary, the defendant under a void judgment can either sit by and rely upon its invalidity (if she knows of its existence) or can set up its invalidity at any time.

There is no hardship on appellants under the rule, because they started with an outlawed claim, and if they had seriously considered collecting a judgment for \$110,000.00, they would have been more careful in the preparation of a record which they knew might not reach the eye of the defendant until after a judgment therein was entered.

A void judgment is attackable any time, any place. It is a nullity. (See Appellee's Brief, pp. 17-25, and *Harris v. Hardemann*, 14 How. 334.)

Appellants cannot avoid this plain jurisdictional defect by contending that somewhere else in the affidavit the affiant covered the point by positive testimony, because the hereinabove quoted piece of hearsay taken from the affidavit is the only reference in the entire affidavit that even relates to the question of the presence or lack of a recorded certificate of residence.

CONCLUSION.

We have given no consideration to the Court's discussion of the Federal authorities applying the rule in other states, for the reason that under the rule California law applies and the California Legislature and the California Courts have spoken definitely upon the subject.

In closing appellee respectfully request a rehearing by this Court of the jurisdictional points referred to in this petition, to the end that the decision heretofore rendered be recalled and the trial Court's order in setting aside the default judgment taken against appellee be affirmed.

Dated, San Francisco,
October 8, 1943.

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CERTIFICATE OF COUNSEL.

The undersigned, James Farraher, one of the attorneys for appellee and petitioner in the said cause and proceeding, hereby certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, San Francisco,
October 8, 1943.

JAMES FARRAHER,
*Of Counsel for Appellee
and Petitioner.*